No. 89-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner

v.

CLEOPATRA HASLIP, *et al.*,
Respondents

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF AMICUS CURIAE OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., THE NATIONAL ASSOCIATION OF EVANGELICALS, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, THE CHRISTIAN LEGAL SOCIETY, THE COALITION FOR RELIGIOUS FREEDOM, THE COUNCIL ON RELIGIOUS FREEDOM, AND THE UNITARIAN UNIVERSALIST ASSOCIATION, AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

MICHAEL J. WOODRUFF
Counsel of Record
Center for Law and
Religious Freedom
4208 Evergreen Lane, Suite 222
Annandale, VA 22003
(703) 642-1070

FOREST D. MONTGOMERY
General Counsel
National Association of
Evangelicals
1023 Fifteenth St., N.W.
Suite 500
Washington, D.C. 20005
Attorneys for Amici Curiae

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INTERESTS OF AMICI CURIAE

The purpose of this brief is to emphasize that standardless imposition of punitive and other noncompensatory damages by civil juries presents a threat to constitutional liberties beyond those immediately involved in this case. In a series of recent cases, vulnerable minority religious groups and congregations have been ordered to pay millions of dollars in damages to former members and their families for emotional injuries allegedly sus-

tained as a result of their participation in the religion. As a practical matter, no more serious danger to religious freedom exists than the power of juries to punish religious groups for practices that seem to them outlandish, unfair, distasteful, threatening, or outrageous.

As the Court considers what limitations the Due Process Clause places on punitive damages in the context of commercial litigation, it should also be aware: (1) that the First Amendment provides an independent source of constitutional restraints on the imposition of punitive damages for the religiously motivated acts of church officials; (2) that First Amendment protections can and should take the form of procedural limits on jury discretion akin to, but more extensive than, those required under the Due Process Clause; and (3) that the constitutional rationale for restraints on punitive damages applies as well to supposedly "compensatory" damages for purely emotional injuries allegedly sustained as a result of participation in religious activities by the plaintiff or by a member of the plaintiff's family. For the reasons set forth in this brief, amici urge the Court to give guidance to the lower coutrs on these matters in its disposition of this case.

The filing of this brief does not imply that the amici agree with the doctrines and practices of any particular religious organization against which large punitive damages have been awarded. We do, however, defend their right to embrace religious beliefs and practices freely and without undue governmental restraint. Amici are guided by a golden rule in matters of religious freedom, desiring for others the same freedoms they wish to enjoy themselves. In the words of the Williamsburg Charter, a bicentenniai document celebrating religious liberty, "Rights are best guarded and responsibilities best exercised when each person and group guards for all others those rights they wish guarded for themselves."

The written permission of the counsel of record for the petitioner and of the counsel of record for the respondent to file this brief are on file with the Clerk. The particular statements of interest of the amici are included in Appendix A.

ARGUMENT

Exorbitant punitive damages are not confined to deep pockets. Nor do they affect only commercial interests. Increasingly, they are a weapon in the age-old struggle to harass or suppress unconventional or unpopular religious movements. This Court is familiar with the way in which tort suits were used in an attempt to cripple the civil rights movement. *NAACP v. Claiborne Hardware Co.*, 485 U.S. 886 (1982); *New York Times v. Sullivan*, 376 U.S. 254 (1964). The presence of social animus against civil rights activities or the press did not deter the Court from recognizing the careful legal regard which a defendant must be accorded because of First Amendment considerations. Amici believe this same regard should now be shown for religious bodies as well.

Indeed, the Court is currently holding two such cases pending resolution of this case. In *International Society for Krishna Consciousness v. George*, cert. pending, No. 89-1399 (filed Feb. 28, 1990), a jury awarded over $29 million in punitive damages for emotional injuries allegedly suffered by a former member and her parents when she ran away from home, joined the Hare Krishna religion, and successfully evaded her parents for about a year. In *Church of Scientology v. Wollersheim*, cert. pending, No. 89-1361 (filed Feb. 23, 1990), a jury awarded over $25 million in punitive damages for emotional distress allegedly suffered as a result of participation in auditing, Scientology's central religious practice. In both cases, the juries were instructed, in accordance with standard California jury instructions BAJI 14.71, that "[t]he law provides no fixed standard" for an

award of punitive damages. The juries were given three factors to consider, without further explanation: (1) the reprehensibility of the conduct of the defendant; (2) the amount of punitive damages that will have a deterrent effect on the defendant; and (3) the reasonableness of the relationship between the punitive damages and the actual damages. As Justice Brennan remarked of a similar jury instruction, this is "scarcely better than no guidance at all." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2923 (1989) (Brennan, J., dissenting). Or as Justice Powell put it, "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Even the trial court in *George* commented that it "believes that the jury lacked some guidelines upon which to predicate its award of punitive damages." Pet. App. 86a in No. 89-1399.

While in both cases the trial or appellate courts reduced the award on state law grounds (in *George*, finding that the principal ground for liability was baseless and unconstitutional), the courts affirmed punitive damage awards of $2,500,000 in *George* and $2,000,000 in *Wollersheim*, in addition to sizable compensatory damages.[1] In neither case did the courts recognize any due

[1] The jury in *George* awarded $1.5 million in compensatory damages to Robin George for false imprisonment, $75,000 for the wrongful death of her father, $250,000 for intentional infliction of emotional distress, and $2,500 for libel. Her mother, Marcia George, was awarded $10,000 for libel and $1.5 million for intentional infliction of emotional distress. The awards to Robin were not reduced on remittitur; the awards to Marcia were reduced on remittitur to $410,000. The court of appeal dismissed all of the claims of Robin except the claim for wrongful death, and did not reduce any of the awards of compensatory damages to Marcia George. The jury in *Wollersheim* awarded $5 million in compensatory damages for intentional infliction of emotional distress. The trial court declined to reduce the award by a "single penny." The court of appeal reduced the compensatory damages to $500,000.

process or First Amendment protections against the standardless imposition of punitive damages by the jury. In *George*, the court of appeals acknowledged "that standardless discretion in the award of punitive damages may implicate constitutional concerns," but chose to await "further action" by this Court. 213 Cal. App. 3d 729, 262 Cal. Rptr. 217, 257 & n. 52 (1989). In *Wollersheim*, the state courts simply ignored the constitutional challenges to the award of punitive damages.[2] In neither case did the reviewing courts articulate or follow any objective standards in setting what they deemed to be an appropriate level of punitive damages. These cases therefore demonstrate the need for this Court's guidance on the constitutional limitations on the imposition of punitive damages.[3]

As this Court considers the due process issues in this case, amici ask that it be aware of the wider implications of punitive damages litigation for the most precious of our constitutional liberties. It is important to signal

[2] In *Wollersheim* the trial court refused to give a statutorily mandated jury instruction that punitive damages may be assessed against a corporation only when an officer, director, or managing agent directs or ratifies the underlying acts of agents or employees of the corporation. Cal. Civ. Code 3294 (b). By ignoring this legislative mandate, the appellate courts have exacerbated the problem of unfettered discretion by extending it to the trial judge as well as the jury.

[3] Other cases in which juries have awarded mammoth punitive and compensatory damages for alleged emotional torts by religious bodies include *Church Universal & Triumphant, Inc. v. Witt*, No. B021187 (Cal. App. Apr. 10, 1989), cert. denied, No. 89-672 ($1.5 million); *Guinn v. Church of Christ of Collinsville*, 755 P.2d 766 (Okla. 1989) ($390,000); *O'Neil v. Schuckardt*, 733 P.2d 693 (Idaho 1986) ($1 million); and *Christofferson v. Church of Scientology*, No. A770405184 (Multnomah Cty. 1985) ($39 million, overturned on motion for mistrial).

to the lower courts that whatever the due process rights of commercial corporations, the rights of religious bodies or other First Amendment defendants demand strict procedural safeguards.[4] In particular, the Court should note: (1) that the First Amendment provides an independent source of constitutional restraints on the imposition of punitive damages for the religiously motivated speech and acts of church officials; (2) that First Amendment protections can and should take the form of procedural limits on jury discretion akin to, but more extensive than, those required under the Due Process Clause; and (3) that the constitutional rationale for restraints on punitive damages apply as well to supposedly "compensatory" damages for purely emotional injuries allegedly sustained as a result of participation in religious activities by the plaintiff or by a member of the plaintiff's family.

I. THE FIRST AMENDMENT PROVIDES AN INDEPENDENT SOURCE OF CONSTITUTIONAL RESTRAINTS ON THE IMPOSITION OF PUNITIVE DAMAGES FOR THE RELIGIOUSLY MOTIVATED ACTS OF CHURCH OFFICIALS

This Court has held that the First Amendments limits the power of juries to impose punitive damages in defamation cases. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-350 (1974), the Court held that punitive damages

[4] Several broadcasters and other media organizations have filed a brief amicus curiae in this case. In the interest of avoiding duplicative briefing, the religious organizations filing this brief wish to associate themselves with the argument in the media brief that "the first amendment requires the highest standards of due process" and that "standardless and deferential appellate review of punitive damage awards" in a first amendment setting "fails to satisfy [the] heightened due process standards required by the first amendment." See Part III of Brief Amicus Curiae of CBS, Inc., et al., in support of the Petitioner. The arguments set forth in the media brief are fully applicable in the free exercise context, particularly where the religious beliefs and practices involve protected speech.

may not be awarded in a private defamation case unless the plaintiff has proven actual malice (in the *New York Times* sense) by clear and convincing evidence. In so holding, the Court observed that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expression of unpopular views." *Id.* at 350.

Just as the Court recognized that punitive damages can violate the freedom of the press in *Gertz*, it should now recognize that punitive damages can violate the free exercise of religion. The imposition of punitive damages against a religious body meets the threshold test in free exercise cases, for the imposition of punitive damages in amounts as vast as recent juries have been awarding against religious bodies surely constitutes a "significant burden" on the autonomy and integrity of that religious body. See, e.g., *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 (1985); *United States v. Lee*, 455 U.S. 252, 256-257 (1982); *Sherbert v. Verner*, 374 U.S. 398 (1963).

This practice presents a far graver burden on free exercise than any of the cases this Court has recently considered. Unlike the sales and use tax imposed on the distribution of religious literature in *Jimmy Swaggart Ministries v. California State Board of Equalization*, 110 S.Ct. 688 (1990), the awarding of punitive damages against a religious body can be truly destructive of that faith. Unlike *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the use of the court system by private litigants does not involve an allocation by the government of the use of its own property. Unlike *Bowen v. Roy*, 476 U.S. 693 (1986), the award of punitive damages against a religious body does not involve an attempt by a religious claimant to tell the government how to run its own internal operations. On the contrary, it involves state coercion of religion, acting upon the re-

ligious body to change its internal operations and self-understanding by reducing its net worth to the point of impairing its ability to maintain and propagate its faith.

In *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. ——, 110 S.Ct. 1595 (Apr. 17, 1990), this Court left standing the rule affording heightened judicial scrutiny to the protection of religious beliefs and practices where individualized determinations must be made by the government. 110 S.Ct. at 1603. In *Smith*, moreover, the majority noted that religious beliefs and practices that are communicative in character are independently protected under the Free Speech Clause. *Id.* at 1601. Accordingly, the imposition of punitive damages on religious bodies, especially for communicative acts such as invitations to religious conversion, should be governed by the line of cases reflecting special judicial concern for religious liberty. *Thomas v. Review Bd.*, 450 U.S. 707, 717-718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406-409 (1963). On any fair assessment of the cases imposing punitive damages against religious organizations, the standardless award of vast sums of money constitutes a severe burden on the free exercise of religion. Indeed, it is nothing short of "prohibitive" of the free exercise of religion, *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. at 451. It can "effectively choke off an adherent's religious practices," *Jimmy Swaggart Ministries*, 110 S. Ct. at 697.

The impact of punitive damages on the free exercise of religion is readily apparent in a case like *International Society for Krishna Consciousness v. George*, *supra*. There, satisfaction of the judgment would require confiscation and sale of the principal temples, schools, monastic living facilities, and book publishing offices of the religion. Indeed, only the grant of a stay by this Court,

No. A-682 (Apr. 16, 1990), averted that calamity. It should be obvious that the confiscation of property or facilities dedicated to the practice of religion is a burden on free exercise, and thus requires a compelling justification.

The Court has held, however, that "punitive damages are wholly irrelevant to the state interest that justifies" liability in private defamation cases. *Gertz*, 418 U.S. at 350. Such damages "are not compensation for injury." *Id.* Rather, as this Court has observed, they "are in effect a windfall to a fully compensated plaintiff." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). Similarly, in cases involving alleged emotional injury on account of involvement in religious practices, there is no legitimate, let alone compelling, justification for damages that go beyond compensation for "actual harm." *Gertz*, 418 U.S. at 350. "Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing [worshippers]." *Fact Concerts*, 453 U.S. at 267.

Defenders of expansive tort liability in the commercial context have argued that there is a sound economic rationale for punitive damages. Without taking a position on the validity of those arguments in the commercial context, amici wish to point out that they are utterly inapposite in the context of emotional distress torts against religious bodies.

First, defenders of expansive liability argue that commercial defendants are able to "spread the risk." Yet this rationale has a very different implication when the risk is being spread among stockholders who have invested in a corporation with the expectation of financial gain, or among purchasers of a product or service who receive material benefits from it, than when it is being spread among adherents to a religious body whose only connection to the "risk" is that they contribute to the ministry of the church and worship in the community it

provides. The rationale of reaching a sufficiently "deep pocket" to compensate a victim has very different implications when the pocket is the common fund of the speculative investors, prepared for the risks of doing business with its attendant liabilities, than when it is the free-will offerings of persons who have contributed to a religious body for the purpose of advancing spiritual ends. And the rationale of acknowledging the cost of damage awards as a concomitant of profit-taking is obviously more cogent in the context of profit-making enterprises. See E. Gaffney and P. Sorensen, *Ascending Liability in Religious and Other Nonprofit Organizations* (1984).

Second, the defenders of expansive liability argue that increased deterrence is needed, beyond compensation for actual harm, because the risk of underdeterrence is more dangerous than the risk of overdeterrence. But however free a state may be to adopt rules that err in favor of overdeterring the provision of material goods and services, it is not entitled to extend its policy of overdeterrence to the spiritual realm. In the First Congress, Representative Daniel Carroll of Maryland announced his support for the proposed First Amendment because "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." 1 *Annals of Congress* 757 (Aug. 15, 1789). Similarly, this Court has stated that when tortious activity "occurs in the context of constitutionally protected activity"—such as conversion into, and practice of, religion—" 'precision of regulation' is demanded." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982); *NAACP v. Button*, 371 U.S. 415, 438 (1963). Punitive damages are more than a "gentle touch." They are a crushing blow. They have all the "precision of regulation" of a "meat-ax ordinance." *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring).[5]

[5] If the unfettered discretion of licensing authorities must be reined in to protect first amendment values, see, e.g., *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976); *Lovell v. Griffin*, 303 U.S. 444 (1938), so must the discretion of juries be cabined when they threaten to weaken those values.

There is another reason why punitive damages should be viewed differently in the context of a religious organization than in the context of a profit-making venture. To the extent that punitive damages achieve their deterrent effect on religious bodies, they may offend the First Amendment by inducing or even coercing a compromise of sincerely held religious beliefs and practices in order to avoid further liability. That effect, of course, may constitute a chill on protected religious activity and an infringement of religious autonomy.

This is not to say that religious organizations are free to engage in tortious acts with no consequence for their behavior. Amici do not argue for an absolute charitable immunity. We merely note that in a profit-making corporation, the threat of punitive damages, measured against net worth, is effective because it is always a threat to corporate surplus and profits. Imposing punitive damages will induce the stockholders and managers to monitor the activities of their agents to reduce the exposure. In a religious body, however, the motivations for allegedly tortious conduct may have been spiritual in nature (even if misguided), and the adherents to the religion, who bear the brunt of the verdict, may have no practical means for controlling the alleged wrongdoers.

The effect is particularly troubling in the setting of denominations with a congregational polity, since the central denomination has no authority to control the activities of its fellow churches. It is also particularly troubling in the setting of denominations whose officials are not subject to the control of the membership. In both of these settings, the imposition of punitive damages affords no comparable lesson afforded the corporate de-

fendant. It can be as pointless as it is cruel. But the imposition of punitive damages is unduly destructive in any religious community, whatever its organizational structure, because thousands of innocent believers are forced to pay for wrongs in which they took no part. See *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) ("blameless or unknowing" taxpayers who "took no part in the commission of the tort" should not be liable for punitive damages in 1983 actions); see also *Int. Brotherhood of Elect. Workers v. Foust*, 442 U.S. 42 (1979) (rank and file not liable for punitive damages arising out of duty of fair representation in union setting).

Whatever credence this Court is inclined to give arguments in favor of punitive damages in the commercial setting, amici urge that the Court note in its opinion the significant differences between for-profit corporations and not-for-profit corporations (including religious organizations), and to clarify that these arguments have no applicability in a First Amendment setting.

II. PROCEDURAL PROTECTIONS IN CASES INVOLVING FIRST AMENDMENT RIGHTS ARE SIMILAR TO, BUT MORE EXTENSIVE THAN, THOSE REQUIRED IN COMMERCIAL CASES UNDER THE DUE PROCESS CLAUSE

This Court has recognized that cases involving unconventional or unpopular expression require procedural safeguards to guard against jury abuse. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Gertz, supra.* Indeed, "procedural safeguards often have a special bite in the First Amendment context." *Chicago Teachers' Union v. Hudson*, 475 U.S. 292, 303 n. 12 (1986). Thus, amici request that the Court acknowledge in its opinion in this case that whatever protections against standardless or excessive punitive damages the Due Process Clause may afford a commercial litigant, additional protections may well be needed in a First Amendment context.

In both *Gertz, supra*, and *Hustler, supra*, the requirement of clear and convincing evidence of actual malice (in the *New York Times* sense) was thought necessary "to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler*, 458 U.S. at 56. The free exercise of religion needs breathing room too.[6] Where a religious body engages in its mission in order to share its vision of the good with others, that religious body is at the very least entitled to a presumption of good will or good faith similar to that extended to media corporations.

The fundamental problem is that juries may "use their discretion selectively to punish expressions of unpopular views." *Gertz*, 418 U.S. at 350. See also *Foust*, 442 U.S. at 50-51 n. 14. These concerns are particularly ap-

[6] Of course, the nature of the procedural safeguards will be different in different contexts. See *Hustler Magazine*, 485 U.S. at 49 ("a literal application of the actual malice rule is [not necessarily] appropriate in the context of an emotional distress claim"). If interpreted to allow claims based on mere "knowing" or "reckless" infliction of emotional distress, the actual malice standard would simply replicate the "intentionality" requirement of these common law torts. Thus, a jury that finds liability for intentional infliction of emotional distress would, by definition, also find the "malice" necessary for an award of punitive damages even if the infliction of distress is neither "intentional" nor "malicious" in the ordinary sense of those terms. Moreover, there are occasions when a minister or officer of a church may properly be called to "inflict emotional distress" if this is necessary to call his flock to repentance. In *Wollersheim*, the court of appeal expressly noted that "one of the functions of many religions" is "to 'afflict the comfortable'—to deliberately generate deep psychological discomfort as a means of motivating 'sinners' to stop 'sinning.'" 212 Cal. App. 3d 872, 892, 260 Cal. Rptr. 331, 344 (1989). See, e.g., the famous sermon of Jonathan Edwards, "Sinners in the Hands of an Angry God," 1 *Annals of America* 423-33 (1968). It is, of course, fundamental to free exercise jurisprudence that the government must stay out of the business of censoring sermons and religious teaching. See, *e.g., Fowler v. Rhode Island*, 345 U.S. 67 (1953).

propriate to litigation involving the activities of unconventional religious groups. According to recent polling data, a majority of Americans find the religious beliefs and practices of non-mainline religions so distasteful that they are prepared to override important safeguards against abuse of governmental power to suppress those views. For example, about two-thirds (65%) agree that "it should be against the law for unusual religious cults to try to convert teenagers." *The Williamburg Charter Survey on Religion and Public Life*, 7 J. L. & Relig. —— (forthcoming 1990). More than half (57%) endorse the the idea that "the FBI should keep a close watch on new religious cults."

Although the principal target of the new wave of tort litigation against religious bodies these days appears to be unpopular religions at the fringe of American society, all religious organizations are potential targets. For example, in Idaho a jury recently imposed punitive damages against the bishop of an ultra-traditionalist Catholic group in the same amount—$1 million—the the Alabama jury imposed on the petitioner insurance company in this case. *O'Neil v. Schuckardt*, 733 P.2d 698 (Idaho 1986) (tort of alienation of affection arising from theological convictions about interfaith marriages).

Religious prejudice can be ugly. See, e.g., G. Myers, *History of Bigotry in the United States* (H. Christman ed. 1960). This prejudice can be magnified during a civil trial, where plaintiffs' lawyers are often allowed to make arguments of a misleading and inflammatory nature. The records in both the *George* and *Wollersheim* cases are replete with appeals to the fears and prejudices of the jury. Counsel in the *George* case castigated the Hare Krishna religion as a "pernicious evil" and asked members of the jury to "imagine your child going to a Hare Krishna temple." The trial court in *Wollersheim* allowed similar pejorative attacks by counsel upon Scientology. The jury verdicts—totalling over $32.5 million in *George* and $30 million in *Wollersheim*, all on account of intangible emotional injuries—are eloquent evidence of the susceptibility of juries to inflammatory advocacy.

Emotional appeals to the jury seem, regrettably, to be standard fare in tort litigation in many parts of the country. Especially where the victims of these appeals are vulnerable, unpopular minority religions, the First Amendment requires imposition of safeguards more powerful and more extensive than those necessary in commercial litigation.

III. THE REASONS FOR LIMITING JURY DISCRETION TO AWARD PUNITIVE DAMAGES ALSO APPLY TO SO-CALLED "COMPENSATORY" DAMAGES FOR INTANGIBLE EMOTIONAL HARMS

The petition in this case addresses only the imposition of punitive damages. But in tort suits against religious organizations, including the two being held by this Court, the punitive damages issues are intertwined with questions regarding standards for liability for intangible emotional harms. Amici ask the Court to recognize that constitutional limitations on the standardless imposition of damages by juries may apply as well to so-called "compensatory" damages for emotional distress torts against religious organizations. To this end, the Court should either address these related questions on review of one or both of the held cases, or enable the lower courts to do so on remand by vacating not only the punitive damages portions of the judgments in the held cases, but also the portions imposing liability on the claims of emotional injury.

This Court has recognized, in the context of private defamation actions, that even "compensatory" damages for such intangible harms as impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering are subject to constitutional constraints. *Gertz*, 418 U.S. at 350. Where such claims are involved, the Court held, "juries must be limited by appropriate instructions, and all awards must be sup-

ported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury. *Id.* Under *Gertz*, therefore, such issues are not left to the vagaries of state tort law; they must be scrutinized under the United States Constitution.

Emotional distress suits have many of the same characteristics that make punitive damages constitutionally problematic. Like punitive damages, "compensatory" damages for these torts are highly discretionary. There are no objective standards to determine whether the sum awarded is too much, too little, or just right. In the *George* case, for example, the jury awarded over $3 million in "compensatory" damages for emotional distress, despite the lack of any evidence of violence, threats of violence, or mistreatment. In *Wollersheim*, the jury awarded $5 million for emotional distress. It is all but certain that "compensatory" damages of this magnitude already contained a substantial punitive element. These awards are several times the amount awarded as punitive damages against the insurance company in this case. It would be pointless for this Court to announce careful standards for the award of punitive damages, and then leave juries free to make the same awards, or worse, unthe guise of "compensation."

Similarly, the common law standards for imposition of liability for infliction of emotional damages are similar to those for imposition of punitive damages. For example, the key element in the emotional distress tort is the finding that the defendant's conduct was "outrageous." Any jury willing to call religious conduct "outrageous" is equally likely to find that it was "malicious, oppressive, and fraudulent."[7] This Court has had occasion to note

[7] In *Wollersheim* the jury was instructed that it might award punitive damages if it found that the "defendant was guilty of oppression *or* malice" in the conduct on which it based a finding of liability. The court then instructed the jury that malice means conduct "intended to cause injury to the plaintiff." Thus once a jury finds intentional infliction of emotional distress, that satisfies the intent standard for malice and triggers the award of punitive damages. There is no significant difference between the standards for finding liability and for imposing punitive damages.

that " 'outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Magazine*, 485 U.S. at 55. If the standards for imposition of punitive damages must be revised to comport with due process, then the standards for the imposition of "compensatory" damages for emotional distress torts require revision as well.

CONCLUSION

For the reasons set forth in this brief, the Court should acknowledge in its opinion in this case that whatever protections against standardless or excessive punitive damages the Due Process Clause may afford a commercial litigant, additional protections may well be needed in a First Amendment context.

Respectfully submitted,

MICHAEL J. WOODRUFF
Counsel of Record
Center for Law and
Religious Freedom
4208 Evergreen Lane, Suite 222
Annandale, VA 22003
(703) 642-1070

FOREST D. MONTGOMERY
General Counsel
National Association of
Evangelicals
1023 Fifteenth St., N.W.
Suite 500
Washington, D.C. 20005
Attorneys for Amici Curiae